No. 20,087

IN THE

United States Court of Appeals

For the Ninth Circuit

WALTER JOHNSON, individually and as Secretary-Treasurer of DEPARTMENT STORE EMPLOYEES UNION, LOCAL 1100, etc., et al.,
Appellants,

vs.

RAPHAEL WEILL & COMPANY, INC., d/b/a THE WHITE HOUSE, etc., et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California, Southern Division

REPLY BRIEF FOR APPELLANTS

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Table of Authorities Cited

Statutes

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REPLY BRIEF FOR APPELLANTS

There are a number of comments that appellants wish to make with respect to statements and arguments made by appellees in their brief filed herein on August 9, 1965.

First, contrary to appellees' argument (Appellees' Brief, page 5), there can be no question that the denial by the district court of appellants' motion to remand is properly before this Court for review. The

question of removability is jurisdictional and therefore is before the Court for consideration once it appears that the case is properly before the Court for review of an appealable order. *Mayflower Industries v. Thor Corp.* (C.A. 3, 1950), 184 F. 2d 537; *Chicago, R.I. & P.R. Co. v. Stude* (C.A. 8, 1953), 204 F. 2d 116; *Hook v. Hook & Ackerman, Inc.* (C.A. 3, 1956), 233 F. 2d 180; 6 *Moore's Federal Practice,* § 54.08.

There is no merit to appellees' argument contained in their brief at pages 13-14, that the Labor Management Relations Act, although it includes trustees in bankruptcy as "persons" covered by the Act (29 U.S.C. 152(1)), does not extend to suits to compel arbitration under Section 301 (29 U.S.C. 185). Appellees urge that the definition of "person" as including a trustee in bankruptcy relates only to the use of that word in subchapter II of Chapter 7 of U.S. Code Title 29, whereas Section 301 appears in subchapter IV of the same Chapter 7. Appellees apparently overlook the express language in 29 U.S.C. 142, which provides as follows:

> "When used in this *chapter*—
> * * *
>
> (3) *The terms* 'commerce', 'labor disputes', *'employer',* 'employee', 'labor organization', 'representative', *'person',* and 'supervisor' *shall have the same meaning as when used in subchapter II of this chapter* as amended by this chapter." (Emphasis supplied.)

It is therefore obvious that the definitions of "employer" and "person" in Section 2(1) and (2) of the

Act (29 U.S.C. 152(1) and (2)) apply to all proceedings under the Act, including suits to compel arbitration brought in the federal courts under Section 301 or in state courts under state law by virtue of *Dowd Box v. Courtney,* 368 U.S. 502, 82 S. Ct. 519, 7 L. Ed. 2d 474.

Appellees also argue that the "employer" definition contained in Section 2(2) of the Act (29 U.S.C. 152 (2)) does not make reference to trustees in bankruptcy, and that inasmuch as Section 301 suits are between labor organizations and "employers", that section cannot apply to trustees in bankruptcy. (Appellees' Brief, page 14.) This argument fails to take into consideration the express language of the Section 2(2) definition of "employer" as including all forms of "persons", described in Section 2(1), acting as agents of an employer, whether they be "one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers". (29 U.S.C. 152 (1).) Further, the "employer" definition is specific in its exclusions from employer status, and such exclusions do not include trustees in bankruptcy.

Therefore, trustees in bankruptcy are subject to suits to compel arbitration pursuant to the terms of applicable collective bargaining agreements. The specific application of the Labor Management Relations Act to trustees in bankruptcy makes the decisions upholding the power of Congress to vest jurisdiction over certain proceedings in forums other than the Bankruptcy Court of compelling significance. It also

removes appellees' only real argument which is that Congress meant to vest paramount jurisdiction in the NLRB, but not in the courts under Section 301. Thus, appellees' arguments that it is the bankruptcy court that has exclusive jurisdiction in these matters, citing Sections 2a(2) and 2a(7) of the Bankruptcy Act, *Ex Parte Baldwin,* 291 U.S. 610, 78 L. Ed. 1020, and *Thompson v. Magnolia Petroleum Co.,* 309 U.S. 478, 60 S. Ct. 628, 84 L. Ed. 876, and that the bankruptcy court will not surrender such jurisdiction except in unusual and exceptional circumstances, citing *Mangus v. Miller,* 317 U.S. 178, have no merit and cannot be regarded as controlling in the instant case. (Appellees' Brief, pages 10-11.) Rather, the decisions cited by appellants at page 19 of their opening brief, reflecting the courts' recognition of the principle that Congress has the power to vest in other forums jurisdiction over certain proceedings which may arise in the course of bankruptcy proceedings and the power to *require* that the bankruptcy court *qua* bankruptcy court surrender its jurisdiction to these other forums, are plainly controlling in the light of the specific Congressional intent manifested in the Labor Management Relations Act. There is, therefore, no question in this case regarding the *extent* or *character* of the discretion in the bankruptcy court or its *usual* powers *vis-a-vis* bankruptcy proceedings.

The question, instead, is which court is to be utilized by the aggrieved party to the collective bargaining agreement, i.e., the *state court* under the authority of *Dowd Box v. Courtney,* supra, or the *federal court*

under Section 301 of the Labor Management Relations Act (29 U.S.C. 185).

It thus becomes apparent that the decision in *In re Muskegon Motors Specialties Co.* (C.A. 6, 1963), 313 F. 2d 841, is not only erroneous for the reasons cited in appellants' Brief (page 16, footnote 5), but is inapposite to this case. That decision involved union claims in the federal district court that that court should have surrendered its jurisdiction *qua* bankruptcy court *in favor of arbitration*. Those are not the claims herein. Rather, appellants seek to enforce the Congressional intent manifested in the Labor Management Relations Act in providing the state courts and federal courts (not sitting as bankruptcy courts) as forums for the securing of available remedies, including arbitration, for violation of collective bargaining agreements. Although the union in *Muskegon,* supra, cited a number of cases which have been cited by appellants herein, the Court of Appeals for the Sixth Circuit in *Muskegon,* supra, held that they did not support the union's claim in favor of arbitration over the bankruptcy court. The Court stated:

> "In those cases, jurisdiction was surrendered either *to another court of competent jurisdiction* or to an administrative agency which was empowered by law to hear and determine the particular controversy." (Supra, at page 843; emphasis supplied.)

Appellants herein are seeking relief in "another court of competent jurisdiction", a right clearly given

them by the Labor Management Relations Act and its interpretation by the courts.

That the proper forum, i.e., the state court under state law (*Dowd Box v. Courtney,* supra) or the federal court under Section 301 may compel a trustee in bankruptcy to submit to arbitration is made clear by the LMRA and court decisions thereunder. The arbitration process is a creature of the Congressional intent as manifested in the Labor Management Relations Act, *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972; *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403; *United Steelworkers v. Enterprise Corp.,* 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424; *United Steelworkers v. Warrior & G. Nav. Co.,* 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409; *Order of Railway Conductors v. Pitney,* 326 U.S. 561, 66 S. Ct. 322, 90 L. Ed. 318 (adjustment board under the Railway Labor Act), as well as being consensual in nature. *Retail Clerks Local 770 v. Thriftimart Inc.,* 59 C. 2d 421, 380 P. 2d 385.

The decision in *Republic Steel v. Maddox,* 379 U.S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580 makes amply clear the necessity for the arbitration machinery even though at some future date the employer-party to the collective bargaining agreement ceases operations and files a petition in bankruptcy. Appellees argue that the employer could not be concerned at the contract negotiations stage about remedies available to the union in the event of the corporation's ultimate bankruptcy since it no longer has any interest in the

union's claim. (Appellees' Brief, page 18.) Appellees' argument thus is one of hindsight, that is, from the bankruptcy stage back to the contract negotiations. Such an approach is unrealistic and fails to take into consideration the nature of collective bargaining negotiations, to wit, to agree in writing to provide for every possible contingency in the future. The question thus is one of foresight and forecast, not hindsight. That this is the recognized function and status of collective bargaining contract negotiations is made clear by the courts when, with reference to arbitration, the contract is held to govern every contingency and every dispute or grievance *not specifically excluded* from arbitration coverage by the contract itself. In *United Steelworkers v. Warrior & G. Nav. Co.,* supra, the Supreme Court declared:

> "Arbitration is the means of solving the *unforeseeable* by molding a system of private law *for all the problems which may arise* and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties.
>
> * * *
>
> Apart from matters that the parties *specifically exclude, all* of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective bargaining agreement . . ." (Supra, at 4 L. Ed. 2d pp. 1416-1417; emphasis supplied.)

It is clear from the collective bargaining agreements contained in the record on this appeal that there is no specific exclusion from the arbitration process of

those disputes arising under the contract upon the contingency of bankruptcy.

The *Maddox* case, supra, bears out this philosophy. Justice Harlan, speaking for the U. S. Supreme Court, made this point:

> "Only in the situation in which no employees represented by the union remained employed, as would be the case with a final and permanent plant shutdown, is there no possibility of a work stoppage resulting from a severance-pay claim. *But even in that narrow situation, if applicable law did not require resort to contract procedures, the inability of the union and the employer at the contract negotiation stage to agree upon arbitration as the exclusive method of handling* permanent shutdown severance *claims in all situations could have an inhibiting effect on reaching an agreement.*" (Supra, 13 L. Ed. 2d at p. 585; emphasis supplied.)

Thus, if arbitration and contract procedures could be erased simply by the filing of a petition in bankruptcy, the congressional policy in favor of collective bargaining and the negotiation of agreements leading to industrial stabilization would be stultified at the bargaining table, at the very beginning of the collective bargaining process.

Appellees' argument that because complicated issues on the merits exist in the instant case any arbitration proceedings would be time-consuming and expensive is as irrelevant as it is untrue. (Appellees' Brief, page 19.) The arbitration process is what the parties contracted for and the fact that issues involved may

be complicated does not excuse the avoidance of the process. Actually, the arbitration tribunal is expressly created and designed to expedite the resolution of controversies in as least costly a manner as possible. These are the very reasons why the parties agree to the arbitration process as opposed to the more expensive and time-consuming machinery of the courts.

Appellees' assertion that an award by an arbitrator would be reviewable only to an "extremely limited extent" (Appellees' Brief, page 21) indicates an erroneous interpretation of federal labor law. Clearly, the court's role is very limited in deciding whether this or that grievance should be submitted to arbitration. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. *United Steelworkers v. American Mfg. Co.,* supra. However, this is not the point at issue here. The question of the extent of review of an arbitrator's decision or award is an entirely different matter. An arbitrator "does not sit to dispense his own brand of industrial justice". (*United Steelworkers v. Enterprise Corp.,* supra, 4 L. Ed. 2d at p. 1428.) His award is legitimate so long as it draws its essence from the collective bargaining agreement. When his words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. (Id. at p. 1428.)

It is also clear that the bankruptcy court has a reviewing power over all judgments from other courts as well as all claims coming to it, although that reviewing power would be, of course, narrower than any

procedure amounting to a trial in the bankruptcy court itself. *Nathanson, Trustee v. NLRB,* 344 U.S. 25, 73 S. Ct. 80, 97 L. Ed. 23; *Adams v. Champion,* 294 U.S. 232, 79 L. Ed. 880.

Appellees also argue, in an apparent attempt to derogate from the merits of appellants' trust and other claims, that no injunction should have been issued by the Honorable Joseph Karesh of the Superior Court in and for the City and County of San Francisco, nor should it now be issued or permitted to be issued by this Court (Appellees' Brief, pages 22-29). As stated in appellants' opening Brief, at page 24 thereof, this question need not be decided by this Court since it is properly a matter for the appropriate forum in the exercise of its inherent equitable powers to protect its orders. Appellees urge that the decisions in *McKey v. Paradise,* 299 U.S. 119, 81 L. Ed. 75, *Schuyler v. Littlefield,* 232 U.S. 707, 58 L. Ed. 806, and *Adams v. Champion,* 294 U.S. 232, 79 L. Ed. 880, clearly indicate that appellants' assertions have no validity on their merits. This is not pertinent on this appeal and, in fact, would be improper for this Court to decide in the light of *United Steelworkers v. Warrior & G. Nav. Co.,* supra, and *United Steelworkers v. Enterprise Corp.,* supra. These cases clearly reject the doctrine that courts may pass on the merits of claims subject to arbitration under collective bargaining agreements.

It is, however, noteworthy that the facts of the instant case are significantly different from those in *McKey v. Paradise,* supra, and *Adams v. Champion,*

supra. It is clear that the instant matter does not involve agreement between the employer and the unions, as in those cases, to *withhold part of the wages of each employee* for payments to the pension plan, and there is thus no basis for a conclusion that the facts here involve merely a debt not paid by the employer. Rather, as is admitted by appellees in their Brief (page 24), there was a specific and enforceable trust created by the parties to the collective bargaining agreement and it is, in part, the existence of this trust and the failure of the employer to make payments thereto for which appellants seek relief. See also the footnote to page 24 of appellants' opening Brief.

Similarly, the decisions in *United States v. Embassy Restaurant,* 359 U.S. 29, 79 S. Ct. 554, 3 L. Ed. 2d 601, and *NLRB v. Deena Artware* (C.A. 6, 1953), 207 F. 2d 798, are distinguishable on their facts and are prematurely asserted since they are used in an attempt to move this Court to decide appellants' claims on their merits. Contrary to appellees' assertions, on page 28 of their Brief, that appellants are seeking herein a priority status over other creditors although they are unable to establish that a trust existed, the facts are that appellants have brought suit in the state court to submit these questions to arbitration. The existence of a trust resulting from the pension plan agreement, and any attendant priority status of pension benefits due the beneficiaries will be determined from that arbitration and the presentation of the arbitrator's award to the bankruptcy court,

much in the same manner as a state court judgment establishing a trust and the enforcement of that judgment in the bankruptcy court.

NLRB v. Deena Artware, supra, cited in Appellees' Brief at page 29, is particularly inapposite for several reasons. There, the claims involved were for *back wages* for improperly discharged employees that were reinstated by the NLRB. It is clear that those claims are not lien claims under the Bankruptcy Act. This is not the situation in the case at bar. Here, the question involves a trust and its enforcement. Further, the NLRB's rationale was that an injunction should issue to prevent contempt of the court's order of enforcement of reinstatement with back pay, and the Court of Appeals refused to assume that the employer would act in contempt at some distant time in the future. In the instant case, the employer is already in bankruptcy and has turned over its assets to the bankruptcy court. Thus, not only are the cases cited by appellees prematurely raised in this Court but they are distinguishable on their facts.

Appellees make two seemingly inconsistent statements with regard to what they contend appellants must do to protect their rights. They urge that the "exclusive remedy of a trust claimant is to file a petition in reclamation" (Appellees' Brief, page 10) and then go on to argue that appellants could "protect their position by filing a contingent claim in the bankruptcy proceedings while reserving their right to have the matter adjudicated by arbitration." (Appellees' Brief, page 23.)

It is clear beyond doubt that appellants may utilize other methods and procedures than those urged by appellees. In *First National Bank in Wichita v. Luther* (C.A. 10, 1959), 217 F. 2d 262, certain trust claimants utilized a petition in equity for the establishment and enforcement of a constructive trust on funds in the hands of the trustee in bankruptcy. Similarly, in the case at bar the appellants have sought arbitration of certain questions, including the establishment and enforcement of a trust, through a suit to compel arbitration in the state court, a right given to them by *Dowd Box v. Courtney,* supra.

The *First National Bank,* case, supra, is significant for another reason. Appellees assert that appellants should file a "contingent claim" in the bankruptcy court, within the meaning of Section 57 of the Bankruptcy Act. (11 U.S.C. 93.) Subsection (n) of that section provides that all such claims, including contingent claims, must be filed within six months after the first date set for the first meeting of creditors or they shall not be allowed. The court in the *First National Bank* case, supra, stated:

> "... The statute [Section 57 and particularly subsection (n) thereof relating to the six month filing period] is confined in its application to claims or like pleadings filed in which the relationship between the claimant or petitioner and the bankrupt is that of debtor and creditor . . . The pleading filed [to impress a trust] was not a claim of that kind . . ." (Supra, at page 265.)

It must be concluded, therefore, that the appellants have proceeded thus far in a proper fashion in seeking

arbitration by suit in the state court and are not restricted to those procedures urged as exclusive by appellees. It may well be that appellants will take further steps to protect their interests by the filing of claims in the bankruptcy court. This, however, does not affect the merits of appellants' contentions or imply that appellants have proceeded in an erroneous manner.

With respect to the jurisdictional question involved in the denial of appellants' motion to remand, appellees apparently miss completely the thrust of appellants' arguments when they state at page 32 of their Brief that "(a)ppellants argue that removal is not permitted where such concurrent jurisdiction exists, but that removal would only be permissible where exclusive jurisdiction is in the federal courts." It would be ludicrous for appellants to make such a suggestion and none has been made. Appellants have established, rather, that an action to compel arbitration, brought in a state court under state-created rights, is not one "founded on a claim or right arising under the Constitution, treaties or laws of the United States" so as to make it removable within the terms of § 1441(b) of the U. S. Removal Statute. (28 U.S.C. § 1441(b).)

Appellees assert that the decision of the U. S. Supreme Court in *Dowd Box v. Courtney,* supra, although affirming the right of the state courts to entertain actions for violation of collective bargaining agreements, makes it clear that Congress has preempted the field in this area and that, therefore, a state court suit is one arising under Section 301 of the

LMRA. Appellees further cite the California Supreme Court decision in *Retail Clerks Local 770 v. Thriftimart,* 59 C. 2d 421, 380 P. 2d 652 in support of this assertion. It is clear beyond doubt that *Dowd Box v. Courtney,* supra, indicates just to the contrary: that Congress has not preempted the field in this area but, rather, state courts have jurisdiction to act under their own laws. Both cases cited, *Dowd Box* and *Thriftimart,* simply recognize that substantive principles of federal labor policy are to be utilized by the state courts. In *Thriftimart,* supra, Justice Traynor declared that "this litigation is within the purview of Section 301 (a) . . ." (at p. 423.) This is by no means to say that such actions are founded on a claim or right arising under the Constitution, treaties or laws of the United States so as to make those actions removable to the federal courts. Thus, the arguments asserted by appellants and the decisions cited by them, including *Shultis v. McDougal,* 225 U.S. 561, 32 S. Ct. 704, 56 L. Ed. 1205; *Gully v. First National Bank in Meridian,* 299 U.S. 109, 57 S. Ct. 96, 81 L. Ed. 70, and *American Petroleum Corp. v. Superior Court of Delaware,* 366 U.S. 656, 81 S. Ct. 1303, 6 L. Ed. 2d 584, must, therefore, be regarded as plainly controlling. (Appellants' Brief, pages 29-36.)

It should be noted also that appellees' argument to the effect that this Court may look to the petition for removal to determine the "interstate commerce" status of the parties (Appellees' Brief, page 33) is quite unnecessary since appellants specifically rely on that status in their presentation of the questions

before this Court for determination (Appellants' Brief, page 7). The validity, however, of that portion of the decision in *Fay v. American Cystoscope Makers* (S.D. N.Y. 1951), 98 F. Supp. 228, cited by appellees, which states that Section 301 (29 U.S.C. 185) did not leave intact a separate and independent state cause of action because Congress *preempted the field* is no longer the law by reason of the holding in *Dowd Box v. Courtney,* supra. In fact, the validity of the removal holding in *Fay* was specifically questioned by the U. S. Supreme Court in the light of its decision in *Dowd Box v. Courtney,* supra. (See Note 8, 368 U.S. at page 514.)

Dated, San Francisco, California,
August 19, 1965.

Respectfully submitted,

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